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Case No. 83-1160

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HINSON McAULIFFE, Individually, and JAMES L. WEBB, as Solicitor General for the County of Fulton, State of Georgia,

Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., IN SUPPORT OF THE PETITION, AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS HINSON McAULIFFE AND JAMES L. WEBB

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Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this Honorable United States Supreme Court, pursuant to Court Rule 36, for leave to file a brief as Amici Curiae in support

of the Petitioners. Consent was granted by Petitioners but has not been granted by Respondent.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty-seven years in the enforcement of laws regulating and combating the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the United States. Citizens for Decency through Law, Inc. (CDL), is a non-profit, non-sectarian, and non-political

organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assistance to prosecutors and law enforcement personnel.

Mr. Keating was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in the "Report of Charles H Keating, Jr., Commissioner",

which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by the membership of one hundred forty-six past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers, who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of obscenity laws is evidenced by his having been plaintiff on behalf of the State of Ohio in an obscenity nuisance abatement

action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel. Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

CDL and its affiliated attorneys have filed over fifty briefs in this Court, both on the merits and as amici curiae, including: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 1052 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966); Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 447, 1110 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 1225 (1973); Jenkins v.

Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 1295 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980); and Flynt v. Ohio, 451 U.S. 619, 68 L.Ed.2d 489 (1981).

Moving Parties hope to urge as amici that a grave misjustice has been done to these particular state prosecutors and, because of their integrity and dedication, they deserve this Courts' special notice to review serious and important legal issues which constantly plague prosecutors and local governments in the honest enforcement of obscenity laws.

It is sincerely hoped that this Court will grant our Motion for Leave to File a Brief as Amici Curiae and allow us to participate in this cornerstone case

which presents important issues for all the people of the United States as well as those of Fulton County, Georgia.

Respectfully submitted,

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CITIZENS FOR DECENCY
THROUGH LAW, INC.
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IN SUPPORT OF PETITIONERS

REASONS FOR GRANTING THE WRIT

Amici submit that the Supreme Court must review this case because the Petitioners were denied their right to an appeal by the Court of Appeals and there is no other remedy available to the state prosecutors but a review in this Court.

Petitioner Hinson McAuliffe is an honorable and faithful public servant who has consistently and lawfully enforced the obscenity laws and deserves special consideration because of his stature and integrity. A profile of Mr. McAuliffe is included in Appendix A. Mr. Webb, his successor, was a dedicated member of this office and will continue the tradition of full and fair enforcement of the law.

The Fulton County Solicitor's Office has been the most successful law enforcement agency in the United States against the widespread commerce in hard-core pornography, making Atlanta only the second major American city after Cincinnati, Ohio, to completely remove hard-core obscenity by successful law enforcement, through several years of effort and hundreds of hard earned convictions. Only Jacksonville and Orlando, Florida, have been able to

likewise stop all obscenity law violations since. Numerous cities, including Buffalo, San Antonio Houston, Boston, Cleveland, Memphis, Miami, Ft. Lauderdale, Denver, Colorado Springs, Chicago, Louisville, Newport (Ky.), Rochester, Los Angeles, San Francisco, Spokane, Seattle, Phoenix, and New York have put forth valiant efforts to enforce valid laws against an increasingly powerful and wealthy pornography syndicate and its organized crime activities. The legal efforts have been difficult and not successful enough, due to an undue amount of clear guidance and support from the courts.

The instant case presents a good example of these problems and a golden opportunity to clarify central points of law to guide future cases. After being denied a fair trial in the federal district court by the District Judge's

misapplication of obscenity law in improperly defining "prurient appeal" and imposing a burden of proof on the civil defendants of "beyond a reasonable doubt", the state prosecutors obtained a judgment of reversal by a three-judge Panel of the Eleventh Circuit on April 11, 1983. (The Panel opinion is set out at pages 2-14 in the Appendix of the Petition, and is reported at 702 F.2d 925.)

However, the Eleventh Circuit subsequently granted a rehearing en banc, and by its local rules treated the Panel opinion as null and void. The en banc Court was thereafter unable to reach a decision on the merits and refused to reinstate the Panel decision. Instead, the en banc ruling of October 17, 1983, stated that the judgment of the district court was affirmed "by operation of law". This result denies the federal

defendants, McAuliffe and Webb, of Due Process by refusing to grant them any appeal as guaranteed by 28 U.S.C. Section 2106.

Had this case arose in another federal circuit made up of an odd number of judges, this result could not have occurred, also denying the state prosecutors of Equal Protection. This Court, in its supervisory capacity over the federal courts of appeals should hold that an en banc review must consist of an odd number of Circuit judges. In some circuits, this would be the natural situation (D.C, 2nd, 4th, 5th, 6th, and 9th Circuits). In the remaining circuits (1st, 3rd, 7th, 8th, 10th, and 11th Circuits), a senior judge should be chosen at random, or a district judge appointed. This would insure that an en banc ruling would reach a decision one way or the other and prevent an appellant

from losing by the default of the court of appeals rather than on the merits of the law. Another solution would be to treat the granting of a rehearing en banc as merely vacating the panel decision pendente lite, and if the en banc court was unable or unwilling to reach a definitive decision, to reinstate the panel's judgment "by operation of law" rather than reinstating the district court's earlier decision.

In this case, the reversal by the Panel on April 11, 1983, amounted to a Judgment in favor of the State of Georgia and its prosecutors, which the Eleventh Circuit had no statutory authority to reverse "by operation of law" under a local rule. Section 2106 of U.S.C. Title 28 guarantees that a losing party in a federal district court shall have his case heard by a court of appeals which must "affirm, modify, vacate, set aside

or reverse" the lower court. Section 2106 also allows a court of appeals to remand and direct an appropriate decision or to remand and require further proceedings. Section 2106 does not allow a court of appeals to refuse to exercise one of these statutory options and to leave the parties where it found them. The appellant is entitled to a decision and failing to do so is a clear violation of the Due Process and Equal Protection Clauses.

If this situation arises in a death penalty case, this Court would not allow a state court of appeals or a state supreme court to throw up its hands and refuse to review the sentence. This Court would at least find it necessary to grant a petition for a writ of certiorari in order to provide the required appellate review. That is all Petitioners are asking in this case, and

Amici submits that this factor alone is an overriding reason for granting the writ in this case.

This case also raises important questions of federal interference in state court administration of its criminal and civil statutes. Federal Courts and local governments have been increasingly burdened with civil rights actions by pornographers trying to escape state obscenity statutes, "Detroit type" zoning ordinances, and to pre-litigate newly enacted obscenity statutes and ordinances. This amounts to a real and expensive form of blackmail and intimidation of state legislators, city councilmen, and law enforcement officers in light of the willingness of federal courts to strike local laws and assess hundreds of thousands of dollars in costs and attorneys fees against already strapped local taxpayers. Section 1983

was designed to offer a means of protecting the rights of those who were previously unable to get fair treatment in some state courts because of their race, color, or creed. It was not envisioned as a tool for criminal pornographers to delay or avoid state prosecutions under valid laws, especially where the state laws are patterned directly after the controlling decisions of this Supreme Court, as Georgia's law is patterned upon Miller v. California, 413 U.S. 15, at 24-25 (1973).

This case also presents a first time opportunity to establish rules of law to govern the questions of "prurience", "community standards", and "serious value". Not since 1957, in Roth v. United States, 354 U.S. 476, footnote 20, has this Court given a definition of the word "prurient". In that case this Court said it was a "tendency to arouse lustful

thoughts", but also mentioned with apparent approval the ALI adjectives of "shameful or morbid interest". The state and federal courts have argued ever since that one or the other or both is correct. This Court has also never clarified whether a film or book must "appeal to" a lustful, shameful, or morbid interest of an average person or whether Miller was objectively requiring that the hypothetical "average person" must judge whether the appeal of the film or book is to a lustful or shameful and morbid type of sexual interest. Amici and prosecutors read this Court's decisions as requiring the latter application, but the pornographers (and the district court below in this case) have maintained the former. Now is the time for this Court to simply put this controversy to a resolution and thereby guide the trial and appellate courts on this most

important question in obscenity trials. (A federal district court recently struck down the new state obscenity statute of the State of Mississippi because it defined prurient as a "lustful, erotic, shameful, or morbid interest". The court held that only "shameful and morbid" could be used. Goldstein v. Allain, Attorney General, ___ F.Supp. ___ (N.D. Miss. 1983), on appeal to the Fifth Circuit, No. 83-4452.)

There were so many instances in this case where the state prosecutor was denied his right to a fair trial and denied the right to introduce evidence and have the case tried under proper state or federal law that it would be a travesty of justice for this Court to allow the district court result to be sustained without any consideration by an appellate court. The Panel of the Court of Appeals reached at least a fair and

guiding conclusion, and only a mistake of circumstances prevented this result or any other review to intervene. Hinson McAuliffe was the obvious target of Penthouse's anger and contempt because he was enforcing the law against obscene materials successfully. Mr. McAuliffe had reversed this same District Judge once before against Penthouse and their efforts to pander a hard-core movie full of sadism, defecation, and deviant sexual acts should not be allowed to prevail without the review of an appellate court. This whole case cries out for notice, and Amici submits and pleads that this Court will not wash its hands of it as well.

SUMMARY OF ARGUMENT

The District Court erred in accepting full jurisdiction of this action and in litigating factual issues of obscenity under "state law" and then not following the law of the state in making its determination.

The District Court improperly employed the criminal burden of proof, "beyond a reasonable doubt", in a civil case and imposed the burden of proof on the federal defendant to prove a negative. Cooper v. Mitchell Brothers, 454 U.S. 90 (1981), controls on this issue and requires a summary reversal on this point alone.

Appeal to a prurient interest is a concept requiring a fact finder to decide the intended appeal of the work as toward or exploiting a lustful, erotic, shameful, or morbid interest, regardless of whether the work would stimulate or

create such an interest in an average person or any particular person such as a judge or juror. The District Court erred in directing that "Caligula" must appeal to or stimulate a prurient interest of an average persons rather than requiring, under Miller, that an average person must find that the work appealed to a prurient type of sexual interest generally. The District Court's instructions in this regard misled the advisory jury, and led to the jury's erroneous finding that the movie was not legally obscene because it did not appeal to the average person's prurient interest. The District Court erred in failing to overrule the advisory jury on this point.

The District Court also erred when it overruled the jury's finding that the film lacked any serious value. The District Court instead ruled that it did have serious political and artistic

value, without giving the State the opportunity to introduce evidence of pandering to prurient appeal as sanctioned by Splawn v. California, 431 U.S. 595 (1977).

It would, finally, be grossly unfair to allow this case to return to the District Court for the assessment of costs and attorneys fees without the benefit of any appellate review and in light of the circumstances of this case. The state prosecutors who will be individually and officially liable for paying Penthouse an enormous sum for costs and attorneys fees were honestly and lawfully performing their elected responsibilities and should not be a target for mistreatment in the federal courts. Only this Court can prevent this unlawful and unjust result.

LAW AND ARGUMENT

I

WHETHER A FEDERAL DISTRICT COURT MAY PROPERLY DECIDE THE OBSCENITY VEL NON UNDER STATE LAW OF A SEXUALLY EXPLICIT MOTION PICTURE WHICH IS NOT PROTECTED SPEECH AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

Presented in this case is a serious intrusion by the District Court into a matter clearly within the sovereign power of the State of Georgia in violation of prior decisions of this Court and of the Eleventh Amendment to the Constitution of the United States. This improper exercise of jurisdiction by the District Court was discussed in detail by the Eleventh Circuit in the Panel decision which was nullified when the Eleventh Circuit agreed to an en banc consideration of the case. Penthouse International, Ltd. v. McAuliffe, 702 F.2d 925 (11th Cir. 1983) (Set out in the Appendix of the Petition).

At issue in this case is the application of a state criminal obscenity statute which has been determined constitutionally valid on numerous occasions by this Court. Fearing that Mr. McAuliffe would initiate some form of legal action against an exhibition of their film "Caligula" if the film was distributed in or around Atlanta, Fulton County, Georgia, Penthouse filed a lawsuit against Mr. McAuliffe in the district court alleging violations of constitutional rights and seeking an injunction and a declaration of whether the state criminal obscenity statute could be properly applied to the film "Caligula". The District Court held a two-week trial, received evidence relating to the application of the state statute to the film, and declared that the film did not violate state law. It is the position of Amici that the Panel

decision of the Eleventh Circuit was correct in stating that to allow such a cause of action would "countenance the bypass of the entire state criminal justice system", and that "[n]otions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial". Id., 702 F.2d at 928.

If the district court had jurisdiction to decide any aspect of this case, its jurisdiction did not extend beyond that which was described in the Eleventh Circuit Panel opinion. The Panel held that the district court could only determine whether "Caligula" was not obscene as a matter of law, that this should have been Penthouse's burden but was not, and any further action by the district court was improper. This analysis is consistent with this Court's

decision in Jenkins v. Georgia, 418 U.S. 153 (1974), and would allow a district court to make a declaration whether a film was protected by the First Amendment as a matter of federal constitutional law, but if factual issues are present, then "notions of comity and federalism" would require the court to dismiss the case and refrain from any further exercise of jurisdiction, thus allowing the state to properly apply and resolve issues of state law in a state court. Such a result would be in accordance with the recognition of state sovereignty as expressed in the Eleventh Amendment. Such a result would also be in accordance with this Court's decision in Steffel v. Thompson, 415 U.S. 452 (1974), where a cause of action for declaratory relief was recognized by this Court, but no factual issues required resolution.

In conclusion, the District Court acted in disregard of the sovereign power of the State of Georgia to litigate violations of state criminal statutes in state courts. If this Court approves the action of the District Court, it is difficult to perceive any logical stopping place to a line of reasoning that would allow such a cause of action as is presented in this case where a state criminal matter was decided, in advance, in a federal court. If this Court does not grant the Petition for a writ of certiorari in this case, it will be recognizing a cause of action which allows the "trial" of a state criminal matter in federal court, in total disregard of long-standing principles of deference and respect for state criminal justice systems as recognized by this Court in Moore v. Sims, 442 U.S. 415, 425-30 (1979).

II

WHETHER, ASSUMING A FEDERAL DISTRICT COURT HAS JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, SUCH A COURT MAY PROPERLY APPLY A REASONABLE DOUBT STANDARD OF PROOF WHERE STATE CIVIL REMEDIES ARE AVAILABLE WHICH WOULD NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT AND WHEN THIS COURT HAS SPECIFICALLY RULED THAT THE REASONABLE DOUBT STANDARD IS NOT REQUIRED IN SUCH PROCEEDINGS.

The District Court ruled that plaintiff Penthouse's burden of proof in this matter was to merely raise "a reasonable doubt". Mr. McAuliffe, who was the defendant in this civil declaratory action, had the corresponding burden to prove that "Caligula" was obscene "beyond a reasonable doubt". This ruling by the District Court is clearly erroneous and would require a reversal of the decision below because a plaintiff in any case is always charged with the burden of persuasion. The

ruling of the District Court that "beyond a reasonable doubt" was the proper standard of proof in the case disregards prior decisions of this Court and of state courts on the issue. This Court has held on numerous occasions that civil regulation of obscenity is permissible, and has never held that the burden of proof in a civil proceeding must be the "reasonable doubt" standard which is applicable to criminal cases. See: Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books v. Brown, 354 U.S. 436 (1957); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973).

The ruling of the District Court on the burden of proof issue is directly in conflict with this Court's decision in California ex rel. Cooper v. Mitchell

Brothers' Santa Ana Theatre, 454 U.S. 90 (1981) where this Court held that it has never required the "beyond a reasonable doubt" standard in a civil case. The District Court Judge had been informed of this case in the State's trial brief on this issue.

It is the position of Amici that the District Court's error on this issue is sufficient, standing alone, to warrant the granting of the Petition in this case and the reversal of the District Court decision. The application of the erroneous standard of proof clearly was in opposition to prior decisions by this Court and clearly violated the State's and Petitioners' rights to a fair resolution of the issues in the District Court.

III

WHETHER, ASSUMING JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, THE PRURIENT INTEREST TEST OF OBSCENITY REQUIRES THAT SEXUALLY EXPLICIT MATERIAL APPEAL TO OR SEXUALLY STIMULATE--AS OPPOSED TO OFFEND AND REPULSE--THE AVERAGE PERSON.

The "prurient interest test" is central to obscenity law and is usually the most vigorously contested point between the prosecutors and the pornographers wherever in the country an obscenity trial takes place. This Court, Amici submits, made clear in Roth v. United States, 354 U.S. 476, footnote 20 (1957), Mishkin v. New York, 383 U.S. 502, 508 (1966), and Miller v. California, 413 U.S. 15, 30 (1973), that prurience is a legal term of art meaning a "lustful", "erotic", or "shameful or morbid" type of sexual interest which must be found to be the predominant or "as a whole" appeal or direction of an

obscene book or film. As stated in Miller, supra at 30:

> [T]riers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient"... (Emphasis added)

This Court did not ask courts to make juries find that hard-core pornography appeals to or sexually stimulates such a prurient interest in an average person or in the jury itself, as the District Court below instructed in this case. Mishkin, supra at 508, specifically holds to the contrary of such an instruction:

> Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the

> erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

This Court's correllative rulings in Ginzburg v. United States, 383 U.S. 463, 466-68 (1966), Hamling v. United States, 418 U.S. 87, 129-30 (1974), Splawn v. California, 431 U.S. 595, 598 (1977), and Pinkus v. United States, 436 U.S. 293, 303-04 (1978), further illustrate the true nature of prurient appeal and provide for evidence of commercial exploitation, or "pandering", to satisfy a finding of obscenity vel non and to show that any claim of redeeming or serious value would be inappropriate. The District Court below instructed the jury, findings, and employed in its findings, an erroneous interpretation of prurience, to the great detriment of the State and Petitioners, and should be

overruled. This Court should take this opportunity to declare that the "prurient interest" includes a "lustful", an "erotic", and a "shameful or morbid" interest in nudity, sex or excretion and that the true test is whether an "average person" would judge the appeal of the work, as a whole, to be to such a prurient type of sexual interest. Such a ruling by this Court would greatly assist both federal and state trial courts and settle a 25 year old controversy on this point between law enforcement and legislatures versus the pornography industry and its representatives.

IV

WHETHER, ASSUMING JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, THE SERIOUS VALUE TEST OF OBSCENITY WAS PROPERLY CONSTRUED AND APPLIED IN THIS CASE.

The application of the "serious value" test by the District Court in this case is not an accurate reflection of proper obscenity law because the trial court allowed Penthouse to prevail only by showing a reasonable doubt as to value, not to establish that the film "Caligula" in fact had serious value. Furthermore, the District Court denied the State the right to introduce relevant evidence of "pandering" to prurient interests as a defense to the claims of value, in direct contradiction to the rules of evidence established by this Court in Ginzburg v. United States, 383 U.S. 463 (1966) and Splawn v. California, 431 U.S. 595 (1977). Among other

evidence, the District Court refused to allow the State to introduce the May and June, 1980, issues of Penthouse Magazine, which contained the Plaintiff-Respondent's own account of the making of the movie and photo scenes of hard-core sex, violence, mutilation, and deviance taken from the film in question.

At a minimum, the District Court should have required the federal Plaintiff, Penthouse, to establish that its film was constitutionally protected as a matter of law, including that it had serious value. This was the reasoned opinion of the Panel decision of April 11, 1983, and its analysis of the law is both fair and consistent with this Court's decisions and should be considered by this Court in the review of this Petition.

V

WHETHER COSTS MAY BE CAST AGAINST A STATE PROSECUTOR IN HIS INDIVIDUAL CAPACITY WHEN, ACTING IN GOOD FAITH AND WITH PROBABLE CAUSE, HE DECLARES HIS INTENTION TO ENFORCE A VALID STATE CRIMINAL STATUTE.

The District Court improperly cast costs in this action against Mr. McAuliffe because it erroneously recognized a cause of action by Penthouse under the federal civil rights statutes, 28 U.S.C. §§ 1343, 1983. As stated earlier, the District Court should only have declared whether the film "Caligula" was protected as a matter of law. Any further action by the District Court was an improper exercise of jurisdiction, and no cause of action should have been sustained under § 1983 for Penthouse because no civil rights had been violated, as the statute requires.

It is also the position of Amici that the policy and reasoning of this

Court in the case of Imbler v. Pachtman, 424 U.S. 409 (1976) prevent casting costs and attorneys fees against Mr. McAuliffe, even if this Court should determine that some cause of action was stated under § 1983. Mr. McAuliffe's prosecutorial immunity should protect him from an award of "costs" in this case, where any reasonable prosecutor who has taken an oath to uphold the laws of the State of Georgia "could have believed there was probable cause that those who would be involved in the exhibition of 'Caligula' in Fulton County, Georgia, would be violating the Georgia obscenity statute as constitutionally applied". See, Panel Opinion of Eleventh Circuit, 702 F.2d at 928.

CONCLUSION

Amici is not asking this Court to decide this case at this stage, even though we submit that Petitioners were correct in their interpretation of the law, that the District Court clearly erred in applying obscenity law concepts, and that the federal courts should not have intervened. We are praying only that this Court hear this case, especially since it would be manifestly unfair to prevent the federal defendants, the State of Georgia and its prosecutors, from having any higher court hear its case.

The Petition for a Writ of Certiorari raises essentially one request, that this Supreme Court "do what's right". Amici implores this Court to do so and grant the Writ.

Respectfully submitted,

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APPENDIX A

Profile of Petitioner Hinson McAuliffe

The Honorable Hinson McAuliffe was appointed Solicitor General of the State Court of Fulton County in 1969. He was re-elected to the office on two occasions and served continuously as Solicitor General until his retirement at the end of 1982. While in office, Mr. McAuliffe brought numerous cases each year against bookstores and theaters in Fulton County, Georgia, for violation of the Georgia obscenity laws. In 1977, 62 cases were either tried before juries with resulting convictions or pleas of guilty were obtained. In 1978, 51 cases were successfully prosecuted for violations of the obscenity law in the State Court of Fulton County. In 1979, 141 cases were successfully prosecuted by Mr. McAuliffe's Office for obscenity

violations. In 1980, at least 129 cases were successfully prosecuted under the obscenity law in the State Court. And in 1981, 87 cases were brought by Mr. McAuliffe's Office.

Through the years, the Solicitor's Office had remarkable success in obtaining convictions against those individuals and entities charged with violation of the state obscenity statutes, and virtually all of these convictions were upheld on appeal. The 383 successful prosecutions in 1977-80 evidenced the approval and support of the Georgia juries, courts, and citizens of the efforts of the Solicitor's Office to enforce the laws. In 1979, for example, McAuliffe won 28 of 29 cases that were brought before Fulton County juries for obscenity violations. Not only was the Georgia criminal obscenity law applied successfully by Mr. McAuliffe through the

years, but he also applied the state civil nuisance statute and injunctive remedies against bookstores and theatres which disseminated "hard-core" pornographic material. The use of these civil proceedings was approved by this Court in the case of Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55, rehearing denied, 414 U.S. 881 (1973). Mr. McAuliffe is the "solicitor for the local state trial court" who was mentioned by the Court at page 51 of that opinion. In addition, civil nuisance actions were successfully brought by Mr. McAuliffe against 13 "adult" bookstores and theatres for violation of the state prostitution and public indecency statutes during the years 1980 and 1981.

During his terms in office, Mr. McAuliffe was so successful in the constitutional application of the Georgia obscenity law that in the early part of

1981, all of the remaining bookstores and theatres which dealt in the distribution of hard-core pornographic materials made the decision to close and leave Fulton County. In return, the pending prosecutions were dismissed by the State. Several pornography warehouses had been in operation in Fulton County, and the last of these warehouses also made the decision to leave in 1981. These illegal businesses remained closed for the remainder of Mr. McAuliffe's term in office as State Court Solicitor General.

Mr. McAuliffe was also successful in a prosecution against Mr. Larry Flynt for the distribution of Hustler magazine in Fulton County. The conviction of Mr. Flynt by a Fulton County jury was upheld through the state appellate court system and certiorari was denied in the case by this Court. Flynt v. State of Georgia, 153 Ga. App. 232 (264 S.E.2d 669), cert.

denied, 449 U.S. 888 (1980). Mr. McAuliffe was further successful in an action which was initially brought against him by certain magazine owners in 1979, in the case of Penthouse International, Ltd., et al. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980). Although the same District Court Judge in this case found against Mr. McAuliffe in that case and determined that none of the magazines involved were obscene, the trial court was reversed on appeal by the Fifth Circuit Court of Appeals which determined that certain issues of Penthouse and Oui magazines were obscene under the "Miller Test".

Virtually all of the convictions obtained in the State Court of Fulton County by Mr. McAuliffe were appealed through the state court system and appeal was generally attempted to this Court. The following section of this Appendix

contains a partial list of cases which will indicate the type of cases in which this Court either affirmed the application of the Georgia law by Mr. McAuliffe or where certiorari was denied in the case by this Court.

APPENDIX B

Representative cases from Fulton County, Georgia, which were affirmed On Appeal

1. Teal v. State of Georgia, 143 Ga. App. 47 (238 S.E.2d 128), appeal dismissed for want of a substantial federal question, 435 U.S. 989, 56 L.Ed.2d 79, 98 S.Ct. 1639 (1978)

2. Simpson v. State of Georgia, 144 Ga. App. 657 (242 S.E.2d 265), appeal dismissed for want of a substantial federal question, 439 U.S. 887, 58 L.Ed.2d 233, 99 S.Ct. 241 (1978)

3. Ballew v. State of Georgia, 241 S.E.2d 19, cert. denied, 436 U.S. 962, 57 L.Ed.2d 1129, 98 S.Ct. 3083 (1978)

4. Dobbs v. State of Georgia, 145 Ga. App. 14 (243 S.E.2d 275), cert. denied, 439 U.S. 899, 58 L.Ed.2d 248, 99 S.Ct. 265 (1978)

5. Cargal v. State of Georgia, 144 Ga. App. 238 (241 S.E.2d 8), cert. denied, 438 U.S. 906, 57 L.Ed.2d 1149, 98 S.Ct. 3125 (1978)

6. Adult Bookmart, Inc. v. State of Georgia, 152 Ga. App. 838 (264 S.E.2d 273), cert. denied, 449 U.S. 886, 66 L.Ed.2d 111, 101 S.Ct. 240 (1980)

7. Allen, et al. v. State of Georgia, 144 Ga. App. 233 (240 S.E.2d 754), cert. denied, 439 U.S. 899, 58 L.Ed.2d 247, 99 S.Ct. 264 (1978)

8. Pierce, et al. v. State of Georgia, 145 Ga. App. 680 (244 S.E.2d 589), cert. denied, 439 U.S. 1088, 59 L.Ed.2d 55, 99 S.Ct. 869 (1979)

9. Whisenhunt v. State of Georgia, 146 Ga. App. 571 (246 S.E.2d 691), cert. denied, 443 U.S. 903, 61 L.Ed.2d 871, 99 S.Ct. 3094 (1979)

10. Maxwell, et al. v. State of Georgia, 152 Ga. App. 776 (264 S.E.2d 254), cert. denied, 449 U.S. 889, 66 L.Ed.2d 114, 101 S.Ct. 245 (1980)

11. Wood v. State of Georgia, 144 Ga. App. 236 (240 S.E.2d 743), cert. denied, 439 U.S. 899, 58 L.Ed.2d 247, 99 S.Ct. 265 (1978)

12. Hays v. State of Georgia, 145 Ga. App. 65 (243 S.E.2d 263), cert. denied, 439 U.S. 947, 58 L.Ed.2d 339, 99 S.Ct. 341 (1978)

13. Hostetler v. State of Georgia, 145 Ga. App. 55 (243 S.E.2d 256), cert. denied, 439 U.S. 947, 58 L.Ed.2d 339, 99 S.Ct. 341 (1978)

14. Speight v. State of Georgia, 148 Ga. App. 87 (251 S.E.2d 36), cert. denied, 444 U.S. 886, 62 L.Ed.2d 117, 100 S.Ct. 180 (1979)

15. Stancil, et al. v. State of Georgia, 155 Ga. App. 731 (272 S.E.2d 511), cert. denied, 451 U.S. 975, 68 L.Ed.2d 357, 101 S.Ct. 2058 (1981)

16. Showcase Cinemas, Inc., et al. v. State of Georgia, 156 Ga. App. 225 (274 S.E.2d 578), writ of certiorari dismissed under Rule 53, 451 U.S. 934, 68 L.Ed.2d 343, 101 S.Ct. 2037 (1981)

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Motion and Brief were mailed, U.S. Postage prepaid, to each of the following counsel for Petitioners and Respondent on this 16th day of January of 1984.

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